

Southern District of Georgia 3 O'clock & 05 min. PM
Savannah Division Date 4-20-93

At 3 O'clock & 05 min PM
Date 4-20-93

In the matter of:

JAMES POWELL ATWOOD

Debtor

Chapter 11 Case Involuntary

Number 88-41165

The involuntary bankruptcy proceeding filed by the petitioning creditors against James P. Atwood ("Atwood") was dismissed by order of this court on May 14, 1992. Atwood subsequently filed a Motion for Order Authorizing and Directing Payment of Attorney's Fees and Costs. A hearing on the Motion was held on February 25, 1993. Upon consideration of the evidence adduced at that hearing, the history of this proceeding, and the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

Petitioning creditors, Charles Sipple, III, and Joel Gibson ("Sipple and

Gibson") are judgment creditors of James P. Atwood by virtue of a certain judgment of the Superior Court of Chatham County, State of Georgia, dated June 17, 1986, which judgment has been duly entered on the Execution Docket for Chatham County, Georgia, in an original amount of \$482,913.56. Sipple and Gibson commenced discovery in Fi.Fa. in Superior Court of Chatham County before Judge Cheatham to enforce their judgment. In response to petitioners' discovery efforts, Atwood resisted petitioners' efforts through a series of motions for protective order invoking Fifth Amendment rights and citing national security issues in support thereof. *See* Transcript of Hearing, June 12, 1989, page 3.

Sipple and Gibson, along with Michael J. Gannam ("Gannam"), filed an involuntary bankruptcy proceeding against Atwood pursuant to 11 U.S.C. Section 303(b) on October 25, 1988. The involuntary petition against Atwood was filed in the United States Bankruptcy Court for the Southern District of Georgia and service was promptly attempted.

Rather than filing an answer, Atwood filed a Motion to Dismiss the petition based upon a claim of inadequate service of process as well as a Motion to Dismiss for Failure to State a Claim and Abuse of Process. *See* Atwood's Special Appearance Plea to Jurisdiction filed November 28, 1988. This court allowed the summons to be reissued and Atwood was served properly on December 6, 1988. *See*

Summons to Debtor in Involuntary Case, December 2, 1988.

On January 25, 1989, Atwood's Motion to Dismiss came on for hearing before this court. At that time, Atwood was represented by Mr. Fletcher Farrington, and asserted that petitioners' complaint was void on its face for failure to state that Atwood was not generally paying his debts as they became due. In discussing whether Sipple and Gibson's complaint should be amended to state that Atwood was not generally paying his debts as they became due, this court remarked:

So, I think whether I require you to amend [the complaint] or not, I guess, sort of begs the question of what has to be proven ultimately for me to enter an order for relief, and I think is going to require a look at the totality of his circumstances to see whether nonpayment of these debts entitles the petitioners to relief.

See Transcript of Hearing, January 25, 1989, page 12.

At the conclusion of this hearing, the court ordered petitioners to amend their complaint to allege that Atwood was not generally paying his debts as they came due. The court further stated:

So, given the petitioners' apparent intention to

attempt to show that the purported debtor is not generally paying his debts as they come due and if you file an amendment to that effect, I think I'm comfortable with announcing that I will overrule the motion [to dismiss] and will have to set a hearing to consider the merits and the defenses to that general pleading, or to that pleading that the debts are not generally being paid.

Id. at page 24.

After making this ruling, the court invited petitioners to depose Mr. Atwood in order to develop facts to support the allegation that Atwood was not generally paying his debts as they came due, said evidence to be used in an evidentiary hearing before the court on this issue. See Transcript of Hearing, January 25, 1989, at page 25.

I would suggest, although I won't require, that you take [Atwood's deposition] so that -- so that we know at the time of whatever evidentiary hearing comes up whether information has been revealed and you're going to use that together with what you already know to prove your case, or whether there has been a refusal to reveal anything and you're going to try to build a case on what you already have only.

Id. at page 26. The court concluded the hearing by stating "[T]ake [Atwood's deposition] and contact me, and we'll see which direction it is preferable to proceed

in." Id. at page 27.

Complying with this court's order, petitioners moved to amend their complaint on January 27, 1989. *See Motion to Amend Creditors' Petition.* By order of this court, dated January 31, 1989, petitioners' Motion to Amend the Complaint was granted and Atwood's Motion to Dismiss for Failure to State a Claim was dismissed. Thereafter, on February 16, 1989, Atwood filed his Answer to the Complaint. On March 28, 1989, Sipple and Gibson filed their notice to take the deposition of Atwood on April 5, 1989. At the request of Mr. Farrington, this deposition was continued until April 19, 1989. On or about April 13, 1989, Kathleen Horne first entered an appearance on behalf of Atwood, and citing a recent illness and a desire to become better acquainted with the file, she requested a continuance that the deposition again be continued. Counsel for Sipple and Gibson agreed to this request. *See Transcript of Hearing, June 12, 1989, at pages 12 and 13.*

On May 8, 1989, Atwood filed a Motion for Summary Judgment, claiming, for the first time in pleadings, that there was an inadequate number of petitioning creditors to place Mr. Atwood in involuntary bankruptcy. Atwood's Motion for Summary Judgment presented, for the first time, an alleged list of creditors. *See Motion for Summary Judgment.* The Motion for Summary Judgment was followed immediately by Atwood's Motion for Protective Order filed May 15,

1989.

The Motion for Protective Order asserted generally that petitioners had indicated that they intended to depose Atwood on unspecified matters, that any such testimony might result in a violation of his Fifth Amendment rights, and that the deposition was not proper because the case should be disposed of on summary judgment. *See* Motion for Protective Order.

Atwood's Motion for Summary Judgment and Motion for Protective Order came on for hearing before this court on June 12, 1989. On the issue of whether or not Atwood had twelve or more creditors at the time of filing of the involuntary petition, this court observed during the hearing that Sipple and Gibson, "really didn't have any way of knowing at filing whether there were twelve or fewer than twelve [creditors]," due to Atwood's persistent refusal to permit discovery. *See* Transcript of Hearing, June 12, 1989, at page 33. On the issue of whether the involuntary petition was improperly motivated, the court further observed:

And, my question is, what's improper if somebody is paying the cable T.V. bill and the Savannah Electric and Power and he's got half a million dollar debt that he won't pay and won't produce any discovery in State Court over what's wrong with them coming to this court to try to preserve the estate? I think that would raise a lot of

questions about whether or not assets may be dissipated or hidden or transferred in the interim. I mean, what's wrong with a person coming and filing an involuntary case to try and protect against that?

See Transcript of Hearing, June 12, 1989, at page 37.

This court went on to permit discovery to proceed on the issue of the number of creditors and the nature of the debts owed by Atwood. Counsel for Sipple and Gibson agreed to proceed within this scope. *See* Transcript of Hearing, June 12, 1989, at pages 43 and 44. The issue of summary judgment was let open pending completion of the discovery sought. *Id.* at page 46.

The deposition of Atwood was finally taken on October 10, 1989. Pursuant to the Notice to Take Testimony and Deposition Subpoena, Atwood was to bring with him all documents relating to the debts scheduled in his affidavit attached to his Motion for Summary Judgment. However, Atwood failed to produce all such documents at the deposition. *See* Deposition of James P. Atwood at page 11. Atwood promised to make these documents available within two to three weeks. *See* Deposition of James P. Atwood at page 88. Nonetheless, these documents were not produced by Atwood until the final evidentiary hearing in this matter on March 30, 1992. *See* Transcript of Hearing, February 25, 1993, at page 19.

Petitioning creditor Michael J. Gannam moved to withdraw as a petitioner by motion dated December 1, 1989, following his receipt of payment in full by Atwood of the debt owed him.

On January 29, 1990, this court issued a Memorandum and Order dismissing the petition upon a finding that Atwood had twelve or more creditors and that there were fewer than three petitioning creditors who filed the bankruptcy. *See Memorandum and Order Dismissing Case.*

On February 9, 1990, petitioners filed their Notice of Appeal to the United States District Court for the Southern District of Georgia, Savannah Division. *See Notice of Appeal of Final Order.* On January 17, 1991, Chief Judge B. Avant Edenfield executed an order affirming this court's order in part and vacating in part, and remanding the case for further evidentiary proceedings. Specifically, the District Court upheld this court's finding that fewer than three claimholders brought the involuntary petition against Atwood. However, the District Court reversed this court's finding, "that Atwood had twelve or more creditors with claims against him that were not contingent, not subject to bona fide disputes, nor paid post-petition in a voidable transfer." *See Order of Judge Edenfield, January 17, 1991, at page 2. See also Judge Edenfield's Corrected Order on Motion for Reconsideration filed February 12, 1991, page 2.*

On remand, this court issued a Memorandum and Order filed February 11, 1992, in accordance with the District Court's conclusions of law. This order made specific findings as to particular creditors and called for a continued hearing on Atwood's Motion for Summary Judgment for the purpose of taking testimony with respect to a number of claims and the source of post-petition payments to other creditors made by Atwood. *See* Memorandum and Order entered February 11, 1992, page 18.

Thereafter the evidentiary hearing as ordered by this court was held on March 30, 1992. Based on the evidence adduced at that hearing, this court entered a Memorandum and Order on Motion for Summary Judgment and on Motion for Reconsideration granting Atwood's Motion for Summary Judgment upon a finding that Atwood had twelve or more creditors and fewer than three petitioning creditors at the time the involuntary petition was filed. This order was entered on May 14, 1992.

After the case was dismissed, Atwood moved for the award of costs and attorneys' fees under 11 U.S.C. Section 303(i) on June 2, 1992. *See* Motion for Order Authorizing and Directing Payment of Attorneys' Fees and Costs. This court conducted a hearing on this issue on February 25, 1993, at which time the court stated: "I will not conclude or do not conclude that there was a bad faith filing when the

involuntary was put into this court." See Transcript of Hearing, February 25, 1993, at page 49.

CONCLUSIONS OF LAW

Atwood has moved this court for an order authorizing and directing payment of attorneys' fees and costs against Sipple and Gibson in the approximate amount of \$30,000.00 pursuant to 11 U.S.C. Section 303(i) which states:

If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment--

- (1) against the petitioners and in favor of the debtor for--
 - (A) costs; or
 - (B) a reasonable attorney's fee.

There does not appear to be any guiding precedent in the Eleventh Circuit with respect to the imposition of attorneys' fees and costs under 11 U.S.C. Section 303(i). It appears that this code section gives the bankruptcy court broad discretion to grant or deny a motion for attorneys' fees. "A motion for attorneys' fees under 11 U.S.C.

Section 303(i) is addressed to the discretion of the court." In re Gerald L. Nordbrock, 772 F.2d 397 (8th Cir. 1985). While this provision is discretionary, "a few reported decisions have assessed fees and costs without a showing of bad faith." In re Advance Press and Litho, Inc., 46 B.R. 700, 702 (D.Colo. 1984). The Advance Press and Litho court also held, "it is not necessary that the involuntary petition be frivolous or meritless to award costs and fees under this subsection, as that is not a stated condition." In re Advance Press and Litho, Inc., 46 B.R. at 703.

This court held at the hearing on February 25, 1993, that Sipple and Gibson did not act in bad faith when filing their involuntary petition. *See* Transcript of Hearing, February 25, 1993, page 49. The sole remaining issue, therefore, is the nature of the discretion given the court to award fees and costs absent a finding of bad faith. *See* Transcript of Hearing, February 25, 1993, at page 49. Various jurisdictions have developed different approaches to the exercise of this discretion. The court in Advance Press and Litho, Inc., noted that any involuntary petition "created onerous circumstances for a debtor" and placed a burden on the debtor to survive the proceeding. Advance Press and Litho, Inc., 46 B.R. at 702. Thus, Congress intended for the "losing creditors to pay for the burden they had created." *Id.* In In re K.P.Enterprise, 135 B.R. 174 (Bankr. D.Me. 1992), the court states, "that unsuccessful petitioners should generally expect that fees and costs will be awarded to the debtor." The court qualifies this statement by saying,

The rule, however, is not hard and fast. Each request for an award of fees and costs invokes the court's discretion, informed by such factors as the reasonableness of the petitioner's actions, their motivation and objectives, and the merits of their view that the petition was proper and sustainable.

In re K.P. Enterprise, 135 B.R. at 177, citing In re Reid, 854 F.2d at 160.

In In re Ross, 135 B.R. 230 (Bankr. E.D.Pa. 1991), the court appears to have adopted a "totality of the circumstances approach" because "in deciding whether to award fees, it becomes difficult to articulate that which a prevailing debtor need demonstrate, beyond dismissal itself, to justify an award under section 303(i)(1)." In re Ross, 135 B.R. at 238. In evaluating the "totality of the circumstances, the Ross court analyzed the merits of the involuntary petition and the inequitable conduct of the party moving for the award of fees. In In re Ross, the court states:

The merits of the involuntary petition refers to whether the decision to dismiss the petition was straightforward. The closer the question of dismissal, the less likely it may be appropriate to award counsel fees. .

In re Ross, 135 B.R. at 238. In the case *sub judice*, a review of the record reveals that the decision to dismiss the petition was anything but straightforward. Atwood's initial

special appearance pleaded lack of jurisdiction and also stated his Motion to Dismiss for Failure to State a Claim and Abuse of Process and Motion to Quash Untimely Served Subpoena which were all denied by this court. Similarly, Atwood's Motion for Protective Order pending resolution of his Motion for Summary Judgment was denied. When this court eventually granted Atwood's Motion for Summary Judgment by Order entered January 29, 1990, the District Court, on appeal, reversed the decision in part, remanding the case for further evidentiary findings. Only after conducting a further hearing on March 30, 1992, was sufficient evidence placed in the record of this court to allow dismissal of the case on summary judgment. As shown in the Findings of Fact in this order, the road leading from the filing of the petition to the ultimate grant of summary judgment was fraught with legal and evidentiary issues which were complicated and could not have been anticipated by petitioners at the time they filed their complaint. The record in this case speaks for itself; the decision to dismiss the petition in question was anything but straightforward.

The court in In re Ross next looked to the equitable merits of awarding fees and costs to the alleged debtor. In its discussion of the equities involved, the Ross court cites In re Amburgey, 68 B.R. 768, 774 (Bankr. S.D.Ind. 1987) for the proposition that a denial of fees is proper under Section 303(i)(1) when the debtor, "'has delayed the expeditious treatment' of the involuntary petition." In re Ross, 135 B.R. at 238, quoting In re Amburgey, 68 B.R. at 774. The alleged debtor

in Amburgey had, "acquiesced in the several continuances, and in this case, languished for almost one and a half years." In re Amburgey, 68 B.R. at 774.

In the case at bar, Atwood has not only acquiesced in permitting this case to languish for almost three and a half years, but actively erected procedural road blocks to the expeditious treatment of the case. To begin with, Sipple and Gibson had little knowledge of the financial affairs of Atwood at the time they filed their petition. This was not due to a failure on their part to make a reasonable inquiry, rather, it was due to the actions of Atwood in invoking Fifth Amendment and national security issues to resist discovery in Fi.Fa. in the Superior Court action from which the debt arises. Rather than simply answer the involuntary petition when filed, Atwood filed various motions to dismiss on the basis of jurisdiction, failure to state a claim, and abuse of process. Even after this court ordered in the hearing on January 25, 1989, that the deposition of Atwood should be held, and after his deposition had been noticed, Atwood requested continuances of this deposition. On May 15, 1989, Atwood filed a Motion for Protective Order to prevent the taking of his deposition. The Motion for Protective Order was filed soon after a Motion for Summary Judgment was filed on May 8, 1989.

These motions necessitated another hearing which was held on June 12, 1989. At that time, the court noted its intent to deny the Motion for Protective

Order, and further directed the parties to proceed with Atwood's deposition on the issues of his creditors and debts. Not until the Motion for Summary Judgment did Atwood provide Sipple and Gibson with a list of his creditors. Finally, on October 10, 1989, Sipple and Gibson were able to depose Atwood. This was nearly a year after the October 25, 1988, filing of the petition. Even when he finally appeared for his deposition, Atwood failed to produce certain documents relevant to his debts and creditors, even though they had been subpoenaed. Atwood assured counsel for Sipple and Gibson that these documents would be made available within two to three weeks. See Transcript of Deposition of James P. Atwood, pages 11 and 88. In fact, Atwood did not make these documents available until the hearing on March 30, 1992.

The facts of this case fall squarely within the holding of In re Amburgey in which it was held that where an alleged debtor delays the expeditious treatment of an involuntary petition, no award of fees and costs is warranted.

This court has considered the reasonableness of the action of Sipple and Gibson in pursuing the involuntary petition. It is unchallenged that Sipple and Gibson hold a judgment against Atwood in the original amount of \$482,913.56 plus interest. Counsel for Sipple and Gibson examined Atwood on the issue of this judgment at hearing on February 25, 1993:

Question: You haven't offered to pay [the judgment] to [Sipple and Gibson] have you?

Answer: No, and I don't intend to offer to pay it.

Question: You don't? Why?

Answer: Because I don't feel I owe it. And I don't have the funds to pay it.

Question: You don't feel you owe it?

Answer: No, I don't

See Transcript of Hearing, February 25, 1993, at page 42.

This court cannot find that Sipple and Gibson were unreasonable in filing an involuntary bankruptcy proceeding against Atwood when he so patently scoffs at a debt owed them, yet is willing and able to pay other creditors; the petitioning creditors had exhausted their collection efforts in State Court and sought relief in this court to preserve from dissipation assets which might be liquidated to pay their claim. The Defendant had thwarted all efforts on their part to gain full knowledge of his financial affairs. Had they had such knowledge and failed to obtain the requisite number of petitioning creditors or had the law concerning the status of joint judgment-holders been clear cut a different conclusion might be warranted. However, in this case both factors lead to the conclusion that this filing was a reasonable effort to

collect a debt fully adjudicated as due and owing in a court of competent jurisdiction.

Lastly, another reason for awarding fees and costs is for the benefit of the alleged debtor's counsel who might otherwise be uncompensated for efforts in defending the involuntary petition. *See generally In re Schiliro*, 72 B.R. 147, 149-150 (Bankr. E.D.Pa. 1987). In the instant case, that cannot serve as a valid basis for awarding fees and costs since virtually all of the attorneys' fees have been paid to date by Atwood. *See* Transcript of Hearing, February 25, 1993, at page 47.

As previously held, this court finds that the petition for involuntary bankruptcy by Sipple and Gibson was not filed in bad faith. This court further finds that the petition as filed, under the totality of the circumstances, was not patently without merit but depended upon extensive legal review prior to ultimate dismissal of the case. Finally, the circumstances of this case and the record which has evolved plainly show that it would not be inequitable to refuse to award attorneys' fees and costs to Atwood. For the foregoing reasons, Atwood's Motion for the Award of Attorneys' Fees and Costs is hereby denied.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law,

ACKNOWLEDGMENTS

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Notwithstanding the fact that the proposed amendments are not intended to change the substance of the provisions of the Act, the Department is submitting them for the purpose of obtaining the views of the Council on the proposed amendments.

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Particular attention should be given to the fact that the

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U.S. DEPARTMENT OF AGRICULTURE FOREST SERVICE REGIONAL OFFICE REGION 1 WASHINGTON, D.C.

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED DATE 04-11-2013 BY 60322 UCBAW/STP/STP

IT IS THE ORDER OF THIS COURT that James P. Atwood's Motion for Attorneys' Fees and Costs is hereby denied.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 20th day of April, 1993.